No. 82-2056

In the Supreme Court of the United States

OCTOBER TERM, 1983

ESCONDIDO MUTUAL WATER COMPANY, ET AL.,
PETITIONERS

v.

LA JOLLA, RINCON, SAN PASQUAL, PAUMA AND
PALA BANDS OF MISSION INDIANS, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION URGING REVERSAL

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QUESTIONS PRESENTED

1. Whether Section 4(e) of the Federal Power Act, 16 U.S.C. 797(e), requires that Mission Indian consent must be obtained under Section 8 of the Mission Indian Relief Act, ch. 65, 26 Stat. 714, before the Federal Energy Regulatory Commission (Commission) is authorized to issue a license for a hydroelectric project on Mission Indian Reservation lands.

2. Whether Section 4(e) of the Federal Power Act requires the Commission to accept without modification conditions submitted by the Secretary of the Interior for inclusion in a license for a hydroelectric project that utilizes Indian Reservation lands.

3. Whether the requirements of Section 4(e) of the Federal Power Act extend to three Mission Indian Reservations whose lands are not utilized for this hydroelectric project.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-30) is reported at 692 F.2d 1223.[1] The court's order amending its opinion and denying rehearing and rehearing en banc (Pet. App. 31-41) is reported at 701 F.2d 826. The opinions of the Federal Energy

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari.

Regulatory Commission (Pet. App. 42-309, 310-378) are reported at 6 F.E.R.C. ¶ 61,189 and 9 F.E.R.C. ¶ 61,241. The decision of the administrative law judge (J.A. 243-368) is reported at 6 F.E.R.C. ¶ 63,008.[2]

JURISDICTION

The judgment of the court of appeals was entered on November 2, 1982. The amended order denying rehearing and rehearing en banc was entered on March 17, 1983. A timely petition for a writ of certiorari was filed on June 15, 1983, and was granted on October 17, 1983. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 49 Stat. 860, 16 U.S.C. 825*l*(b).

STATUTES INVOLVED

Section 4 of the Federal Power Act (FPA or Act), 16 U.S.C. 797, provides in pertinent part:

The Commission is hereby authorized and empowered—

* * * * *

> (e) To issue licenses * * * for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reserva-

[2] "J.A." refers to the joint appendix filed with this Court in this case.

> tions of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation * * *.

This and other pertinent statutory provisions are set forth in the Pet. App. 380-388.

STATEMENT

This case involves challenges to the statutory authority of the Commission [3] to issue a new license to petitioners authorizing them to operate Hydroelectric Project 176, which crosses certain Mission Indian Reservations along the San Luis Rey River in Northern San Diego County, California, over the objections of the Mission Indian Bands (Bands) and the Secretary of the Interior (the Secretary or Interior).

A. Background: The Issuance Of The Original 50-Year License

The San Luis Rey River originates near the Palomar Mountains in northern San Diego County, California. In its natural condition, it flows through the

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[3] The term "Commission" refers to the Federal Power Commission prior to October 1, 1977, and to the Federal Energy Regulatory Commission thereafter. See 42 U.S.C. (Supp. V) 7172(a) and 7295(b).

Reservations of the La Jolla, Rincon, and Pala Bands of Mission Indians and then through the City of Oceanside on its way to the Pacific Ocean. Three other Mission Indian reservations—the Pauma, Yuima,[4] and approximately three quarters of the San Pasqual—are also within its watershed. (A general map of the area is reproduced at Pet. App. 30, 308.) These six Indian Reservations were established pursuant to the Mission Indian Relief Act of 1891 (MIRA), ch. 65, 26 Stat. 712 *et seq.*[5]

Since 1895, the Escondido Mutual Water Company (Mutual) and its predecessor in interest[6] have diverted the waters of the San Luis Rey River out of its watershed to the communities in and around the Cities of Vista and Escondido. The point of diversion is located within the La Jolla Indian Reservation upstream from the other reservations. The conveyance facility for the diverted water, known as the Escondido Canal, crosses parts of the La Jolla,

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[4] The two Yuima tracts are under the jurisdiction of the Pauma Band of Mission Indians. Consequently, while there are six Mission Indian Reservations, only five governing Indian Bands are involved in this case.

[5] That Act called for the reservation land to be held in trust for 25 years followed by the issuance of fee patents. Trust patents were issued for the La Jolla and Rincon Reservations on September 13, 1892, for the Pala Reservation on February 10, 1893, and for the San Pasqual Reservation on July 1, 1910. The Pauma and Yuima Reservations were established in accordance with MIRA through the acquisition of quitclaim deeds by the United States. Subsequently, the 25 year trust period was extended indefinitely. See Interior's Brief on Appeal 17.

[6] In 1905, following the failure of Mutual's predecessor, the Escondido Irrigation District, Mutual was organized to succeed to its interests (Pet. App. 51).

Rincon, and San Pasqual Indian Reservations. The canal terminates at Lake Wohlford, an artificial storage facility. Various agreements, dating back to 1894, among the Secretary of the Interior, the Mission Indian Bands whose lands the canal traverses, and Mutual and its predecessor purportedly granted Mutual and its predecessor rights-of-way across the Reservation lands for the Escondido Canal in return for supplying certain amounts of water to the Bands. Pet. App. 49-50.[7]

In 1915, Mutual constructed the Bear Valley powerhouse, which is located downstream from Lake Wohlford and which drains water from that lake. In 1916, Mutual also completed construction of the Rincon power house, which is located on the Rincon Reservation and which draws water from the Escondido Canal.

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[7] The validity of those agreements is the subject of separate proceedings instituted in 1969 by the Bands (subsequently joined by the United States) in the United States District Court for the Southern District of California. *Rincon Band of Mission Indians, et al.* v. *Escondido Mutual Water Co., et al.*, Nos. 69-217-S, 72-276-S & 72-271-S.

In their complaint in that case the Bands sought: (1) a declaratory judgment that the rights-of-way agreements are void; (2) an injunction prohibiting diversion of the waters of the San Luis Rey River into the Escondido Canal; and (3) substantial damages. On January 10, 1980, the district court entered an order granting partial summary judgment in favor of the Bands and voiding portions of the disputed contracts. The court of appeals refused to permit an interlocutory appeal of that order, and the case remains pending before the district court. Pet. App. 7.

In addition, the Bands have sued the United States pursuant to the Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 25 U.S.C. 70 *et seq.*, for failure to protect their water rights. *Long* v. *United States*, Docket No. 80-A1 (Ct. Cl.). That proceeding is also presently pending.

In 1921, following enactment of the Federal Water Power Act of 1920, ch. 285, 41 Stat. 1063 *et seq.* (now codified as Pt. I of the FPA, 16 U.S.C. 791a *et seq.*), Mutual applied to the Commission for a power license covering its hydroelectric facilities. In 1924, the Commission issued a 50 year license to Mutual [8] covering the Escondido diversion dam and canal, Lake Wohlford, and the Rincon and Bear Valley powerhouses.

B. The Issuance Of The New License

1. In 1969 and 1970, the La Jolla, Rincon, and San Pasqual Bands and Interior filed complaints with the Commission, alleging that Mutual and the Vista Irrigation District (Vista)[9] had violated the terms of Mutual's 1924 license. They sought, inter alia, increased annual payments [10] to the Bands throughout the term of the 1924 license. In response, the Commission initiated an investigation pursuant to Section 4(g) of the FPA, 16 U.S.C. 797(g).

In April 1971, Mutual filed an application with the Commission, subsequently joined by the City of Escondido (Escondido), for a new minor hydroelectric license [11] for the project. In its application, Mutual

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[8] Mutual's license expired in 1974. Since then, it has operated the Project under annual licenses issued pursuant to Section 15(a) of the FPA, 16 U.S.C. 808(a).

[9] Vista is the successor to the ownership and operation of Lake Henshaw, an artificial lake at the head of the San Luis Rey River. In 1922, a dam was constructed on Lake Henshaw to capture the headwaters of the San Luis Rey River.

[10] Annual payments are the sums paid by a licensee for use of reservation lands pursuant to provisions of Section 10(e) of the FPA, 16 U.S.C. 803(e).

[11] Section 10(i) of the FPA, 16 U.S.C. 803(i), authorizes the Commission to issue a minor license for a complete project with not more than 2,000 horsepower capacity, viz. 1,500 kilowatts.

proposed to continue operating Project 176 as it had during the original license period.

In both May and October 1972, Interior requested the Commission to recommend federal takeover of Project 176 under Section 14 of the FPA, 16 U.S.C. 807, after expiration of the original license.[12] In June 1972, the La Jolla, Rincon, and San Pasqual Bands, acting pursuant to Section 15(b) of the FPA, 16 U.S.C. 808(b), applied for a non-power license under the supervision of Interior, to become effective when the original license expired.[13]

2. After lengthy hearings on the competing applications, the administrative law judge (ALJ) concluded that Project 176 satisfied Section 4(e) of the FPA, 16 U.S.C. 797(e), in that it did not interfere and was not inconsistent with the purpose for which the Mission Indian Reservations had been created or acquired (J.A. 303-308). He also concluded that it was "manifest [that] the conditions [which the Secretary of the Interior had proposed for inclusion in the new license pursuant to Section 4(e) of the Act] were designed not to improve the project but to destroy it" and that they amounted to "a Secretarial veto, made confessedly with total disdain for the survival of the project itself and for the law's standard of comprehensive development" (J.A. 300-301). The ALJ found, however, that Project 176 was not prop-

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[12] Section 14(b) of the FPA, 16 U.S.C. 807(b), authorizes the Commission to recommend to Congress that the federal government take over a project once a license expires. If Congress passes legislation to that effect, the project is thereafter operated by the government.

[13] Section 15(b) of the FPA, 16 U.S.C. 808(b), authorizes the Commission to grant a license to use a project as a "non-power" facility if it finds the project no longer is adapted to power production.

erly licensed since it was not constructed or operated primarily for the purpose of generating electricity (J.A. 357-368). On this basis, he ordered dismissal of Interior's complaint, the Vista investigation, and all license applications, including Interior's recapture proposal (J.A. 368).

3. The Commission reversed, holding that contrary to the view of the ALJ, Project 176 was subject to the Commission's licensing jurisdiction (Pet. App. 42-378).

With regard to the past operation of Project 176, the Commission found that Mutual had violated its license by permitting Vista's joint use of project facilities and by diverting water stored in the Lake Henshaw reservoir and pumped from that reservoir through the Escondido Canal (Pet. App. 226-232). Accordingly, it awarded readjusted annual charges to certain of the Bands (Pet. App. 231, 232-245).

Next, rejecting Interior's recommendation for federal takeover and the Bands' application for a non-power license, the Commission granted a new 30-year license for Project 176 to petitioners (Mutual, Escondido, and Vista [14]), with certain conditions deemed necessary to protect the Reservations traversed by the project.[15] At the same time, the Commission rejected

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[14] Although Vista had not applied for a license with Mutual and Escondido, the Commission determined that it should be made a joint licensee because its Henshaw facilities (see note 9, *supra*) are an integral part of the project (Pet. App. 80-86). Once the Commission decided to include Lake Henshaw and its facilities in the project license, it treated the proceedings as an application for an original license rather than as a relicensing pursuant to Section 15 of the FPA, 16 U.S.C. 808 (Pet. App. 133-137 & n.136).

[15] The Commission required development of a permanent water operating plan (Pet. App. 173-190) and delivery of

the arguments of the Bands and Interior that for the Commission to make a lawful finding under Section 4(e) that a project will not interfere or be inconsistent with the purpose for which a Reservation was created or acquired, it had to obtain the "consent" of the Mission Indians pursuant to a variety of statutes, including Section 8 of the Mission Indian Relief Act of 1891, ch. 65, 26 Stat. 714, allegedly requiring specific Mission Indian consent for any use of Reservations lands (Pet. App. 137-142, 155-168).[16]

The Commission ruled further that it was not required to accept without modification conditions submitted by the Secretary under Section 4(e), which the Secretary deemed necessary for the "adequate protection and utilization" of the Reservation. Rather, in the Commission's view, a rule of reasonableness governed. Applying that standard, the Commission accepted some of the Secretary's Section 4(e) conditions, but rejected or modified others on the ground that they would prevent the Commission from fulfilling its licensing obligations under Section 4(e) (Pet. App. 143-155). The Commission thus refused to include a condition proposed by Interior that Mutual and Vista recognize the paramount right of the Bands to the waters of the San Luis Rey River. In the Commission's view, Interior's proposed water-

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certain quantities of water to the LaJolla, Rincon, and San Pasqual Reservations for domestic, agricultural, and commercial uses (Pet. App. 187).

[16] In addition to Section 8 of MIRA, 26 Stat. 714, the Bands asserted that the consent was required under Section 4(e) by virtue of Section 16 of the Indian Reorganization Act, 25 U.S.C. 476 and Section 10(e) of the FPA, 16 U.S.C. 803(e) (Pet. App. 137-142, 161-168).

rights condition was beyond the Commission's jurisdiction and would improperly infringe upon the authority of the district court which was adjudicating the Bands' identical water-rights claim under the *Winters* doctrine (*Winters* v. *United States*, 207 U.S. 564 (1908)) see page 5 note 7, *supra* (Pet. App. 148-159).[17]

Finally, noting that the outcome of the water rights litigation pending in district court might have a significant impact on the continued validity of the license (Pet. App. 187 n.192), the Commission directed that the license be modified "in any manner considered appropriate" after disposition of the water rights litigation (Pet. App. 259).

C. The Decision Of The Court Of Appeals

1. The court of appeals reversed the Commission's order issuing a license to petitioners and remanded the case to the Commission for further proceedings (Pet. App. 1-30).

At the outset, the court held that the Commission had reasonably construed the FPA as granting it licensing jurisdiction over all projects "for the development, transmission, and utilization of power" (16 U.S.C. 797(e)), even though the generation of power is not a significant aspect of the hydroelectric facility's purpose (Pet. App. 12-16).

The court ruled, however, that the interference/inconsistency clause of the Section 4(e) proviso requires the Commission to obtain Indian consent to a license before it can enter a finding that the issuance of a license will not interfere with "the purpose" for

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[17] This and the other conditions submitted by Interior which the Commission rejected (with the reasons for their rejection) are set out in App., *infra*, 5a-11a.

which an Indian Reservation was created or acquired (Pet. App. 17-22). The court therefore concluded that Section 8 of MIRA [18] was applicable and that it required petitioners to obtain right-of-way permits from the LaJolla, Rincon, and San Pasqual Indians, as well as a hydroelectric license from the Commission before they could utilize the project facilities that occupy those Reservations (Pet. App. 21).

The majority further held that the Commission lacks authority to reject or modify any of the license conditions propounded by the Secretary pursuant to the second clause of the Section 4(e) proviso (Pet. App. 22-25). The court rejected the argument that its interpretation of Section 4(e) conflicts with the Commission's obligation under Section 10(a) of the FPA, 16 U.S.C. 803(a), to approve a project that will be the "best adapted to a comprehensive plan" for the utilization of waterways and the development of power (Pet. App. 23-24). The court also rejected the claim that its construction of Section 4(e) would give the Secretary an "unconditional veto power" over the licensing authority of the Commission, noting that any license issued by the Commission that includes conditions propounded by the Secretary would

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[18] Section 8 of MIRA of 1891, ch. 65, 26 Stat. 714, provides in pertinent part:

> Subsequent to the issuance of any tribal patent or of any individual trust patent as provided in section five of this act, any citizen of the United States firm, or corporation may contract with the tribe, band, or individual for whose use and benefit any lands are held in trust by the United States for the right to construct a flume, ditch, canal, pipe, or other appliances for the conveyance of water over, across, or through such lands which contract shall not be valid unless approved by the Secretary of the Interior under such conditions as he may see fit to impose.

be subject to judicial review pursuant to Section 313(b) of the FPA, 16 U.S.C. 825*l*(b) (Pet. App. 24-25).

Finally, the court held that the Commission is required to satisfy the limitations of the Section 4(e) proviso not only as to the three Reservations the Project traverses but to all six of the Mission Indian Reservations in the area (Pet. App. 25-26).

2. On petitions for rehearing, Judge Anderson dissented on these issues (Pet. App. 33-34). Noting that the FPA itself contains a pervasive scheme for obtaining rights-of-way over tribal lands and that the legislative history of the FPA shows that Congress rejected an amendment that would have required tribal consent before a license could be issued affecting tribal lands, Judge Anderson concluded that statutory provisions requiring Indian consent for the use of tribal lands, like Section 8 of MIRA, or Section 16 of the Indian Reorganization Act, 25 U.S.C. 476,[19] cannot be considered as establishing that tribal consent is a prerequisite to use of Indian Reservation lands under hydroelectric licenses issued by the Commission (Pet. App. 34-39). Judge Anderson was of the further view that the Secretary's Section 4(e) conditions must be included in a license only to the extent they are "reasonable" and that under the statutory scheme the responsibility for making the initial reasonableness determination rests with the Commission, rather than Interior or a reviewing court (Pet. App. 40-41). On the facts, Judge

[19] Since the majority found that Section 8 of MIRA had been violated, it did not reach the applicability of other statutes dealing with Indian consent. See page 9 note 16, *supra*.

Anderson concluded "that the FERC properly interpreted and applied § 4(e) and that all of its findings in that regard are supported by substantial evidence" (Pet. App. 41).

INTRODUCTION AND SUMMARY OF ARGUMENT

Certain settled propositions should be emphasized at the outset. First, it is beyond question that "[t]he Federal Power Act constitutes a complete and comprehensive plan for the development and improvement of navigation and for the development, transmission and utilization of electric power in any of the streams or other bodies of water over which Congress has jurisdiction under its commerce powers, and upon the public lands and reservations of the United States under its property powers." *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 118 (1960); accord *Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395, 408 (1975); *FPC* v. *Union Electric Co.*, 381 U.S. 90, 98 (1965); *United States ex rel. Chapman* v. *FPC*, 345 U.S. 153, 167-171 (1953); *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 22-23 (1952); *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. 152, 180 (1946). It is also established that "[i]t is the Commission's judgment on which Congress has placed its reliance for control of licenses." *FPC* v. *Idaho Power Co.*, 344 U.S. at 20; see also *FPC* v. *Oregon*, 349 U.S. 435, 445-446 (1955); *United States ex rel. Chapman* v. *FPC*, 345 U.S. at 171. Moreover, it is equally firm doctrine that the power that Congress delegated the Commission to issue licenses "neither overlooks nor excludes Indians or lands owned or occupied by them" and that, therefore, the authority to license hydroelectric projects on Indian Reservation land applies even if Indian treaty obligations are thereby over-

ridden. *FPC* v. *Tuscarora Indian Nation*, 362 U.S. at 118, 121-124 (citing *Cherokee Nation* v. *Southern Kansas Ry.*, 135 U.S. 641, 656-657 (1890)) and *Missouri, Kan. & Tex. Ry.* v. *Roberts*, 152 U.S. 114, 116-118 (1894); see also, *Nevada* v. *United States*, No. 81-2245 (June 24, 1983), slip op. 30-31.

The issues presented in this case concern the proper application of these principles to the interpretation of the proviso in Section 4(e) of the FPA, which imposes special requirements in regard to licensing hydroelectric facilities on federal "reservations,"[20] including the lands held in trust for Indians by the United States. It is our submission that the holdings of the court below in response to these issues are clearly erroneous, for that court construed the Section 4(e) proviso as incorporating the very limitations on the Commission's licensing power that the Act was designed to preclude.

I

A. As we first show, the interpretation by the court below of the Section 4(e) proviso cannot be reconciled with the congressional intent. To begin with, the holding of the court below, subjecting the Commission's licensing authority to veto by the Secretary and the Bands, violates the settled principle that a proviso in a statute should not be construed to

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[20] The FPA defines "reservations" as including "national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks." § 3(2), 16 U.S.C. 796(2).

destroy the very authority it qualifies. When read in context, the language and structure of Section 4(e) show that the proviso is solely concerned with evidence of significant physical disruption of the operation of a federal reservation and that the proviso's finding requirement and Interior's conditioning authority thereunder are necessarily limited to this practical concern.

We next demonstrate that our interpretation is reinforced by the legislative history of the FPA, which shows that the legislation was intended to centralize licensing authority in the Commission, grant the Commission the sole authority to make the interference/inconsistency finding, and subject Interior's conditioning power to a reasonableness standard under traditional principles relating to easements and rights of way.

B. The Commission's administrative decisions interpreting the Section 4(e) proviso are consistent with the legislative purpose.

1. Thus, the Commission has repeatedly interpreted the interference/inconsistency clause of the Section 4(e) proviso as requiring it to determine whether a hydroelectric facility will result in significant physical disruption of a reservation. In its view, the most important criterion for making that determination is the general impact of the physical aspects of the hydroelectric facility on the reservation. These are matters, moreover, which do not require tribal consent.

2. The Commission has also determined that it is not bound by Section 4(e) to adopt without question all conditions which the Secretary deems "necessary for the adequate protection and utilization of such reservations." Rather, as Judge Anderson found, the Commission is only required to adopt conditions pro-

posed by the Secretary of Interior that can "*reasonably* [be] deemed 'necessary for the adequate protection and utilization of such reservation'" (Pet. App. 41 (emphasis in original; citation omitted). The Commission has therefore viewed the Secretary's conditioning authority as authorizing him to qualify the physical aspects of a hydroelectric facility in a reasonable manner in order to protect the Reservation from disruption.

C. Moreover, contrary to the view of the panel majority, it would significantly distort Section 4(e) to hold that its limitations are applicable to neighboring Reservations because their reserved water rights may be affected by the licensing of a hydroelectric facility. The plain statutory language and its history clearly show that the Commission lacks jurisdiction to determine title to land or water as part of its hydroelectric licensing authority. There is accordingly no basis for extending the limitations of Section 4(e) to neighboring Reservations on the premise that their water rights may be affected by the Commission's issuance of a license.

D. In light of all the circumstances, the Commission is entitled to deference in construing the statute which it has enforced for more than sixty years. Moreover, under traditional principles regarding judicial review of agency action the Commission should have the initial authority to determine whether the Secretary's conditions satisfy this reasonableness standard, subject to appellate court review.

II

Finally, even if, as the court below held, Section 4(e) requires that Section 8 of MIRA be satisfied as regards rights-of-way over Mission Indian lands, Sec-

tion 8 of MIRA does not have the effect the court below attributed to it. MIRA has no application to the authority of the Commission to grant rights-of-way for hydroelectric facilities under the FPA, in which Congress delegated to the Commission its sovereign authority to license use of public lands and Reservations of the United States.

ARGUMENT

I. THE COMMISSION, NOT THE BANDS OR INTERIOR, HAS THE ULTIMATE AUTHORITY TO DETERMINE WHETHER A HYDROELECTRIC LICENSE SHOULD ISSUE

A. The Language And History Of The Section 4(e) Proviso Make Clear That The FPA Grants Central Authority To The Commission To Exercise Licensing Authority, Not To The Bands Or Interior

1. Statutory Language

a. The Section 4(e) proviso, as all of Section 4(e), is framed in practical language.[21] In the Commission's view, Congress meant by that language to assure that the licenses the Commission is authorized to issue will not result in major *physical* interference with the basic purpose for acquiring or creating the federal reservations on which the licenses are issued —*i.e.*, their use as Indian homelands, military reservations, or national forests.[22] The Section 4(e)

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[21] Statutory interpretation must, of course, begin " 'with the language of the statute itself.' " *Bread Political Action Committee* v. *FEC*, 455 U.S. 577, 580 (1982) (quoting *Dawson Chemical Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 187 (1980)); *Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. at 400.

[22] The practical and precise nature of this authority is illustrated by the terms of Section 4(e). Sesction 4(e) only authorizes the Commission to issue a license covering certain

proviso achieves this goal through the interplay of two clauses: the first requires a "finding" by the Commission that "no interference or inconsistency" will result from the issuance of the license; the second authorizes the Cabinet Secretary under whose supervision the Reservation falls to qualify the license with conditions "necessary for the adequate protection and utilization of such reservation."

Reading, as we must, these two clauses of the Section 4(e) proviso in conjunction with each other (*e.g.*, *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974); *Richards* v. *United States*, 369 U.S. 1, 11 (1962)), it is apparent that the interference/inconsistency clause calls for a broad factual determination by the Commission that a hydroelectric facility will not fundamentally impinge upon the use of a Reservation, while the second clause authorizes a Cabinet Secretary to impose particularized requirements on the *physical aspects* of project facilities which he believes "necessary for the protection and use" of the Reservation. Nor is there any statutory reference to tribal consent as an essential prerequisite to the Commission's interference/inconsistency determination; indeed, the legislative history confirms beyond any doubt that Congress did not intend to create a requirement of tribal consent. See page 27, *infra*.[23]

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enumerated physical structures and "project works." "Project works" are defined as "the physical structures of a project" (§ 3(12), 16 U.S.C. 796(12)). See also § 3(11), 16 U.S.C. 796(11); *Chemehuevi Tribe of Indians*, 420 U.S. at 400-403; *Lake Ontario Land Development & Beach Protection Ass'n* v. *FPC*, 212 F.2d 227, 232 (D.C. Cir.), cert. denied, 347 U.S. 1015 (1954).

[23] In *Lac Courte, Oreilles Band of Lake Superior Chippewa Indians* v. *FPC*, 510 F.2d 198, 210 (D.C. Cir. 1975), relied

Moreover, the second clause of the Section 4(e) proviso cannot fairly be read as granting a Cabinet Secretary the authority to frustrate the Commission's "finding" by insisting upon the adoption of conditions asserted to be "necessary for the adequate protection and utilization of such reservation" even though the result of adopting such conditions would compel the Commission to exercise its licensing authority in a way which would exceed the mandate given to it by Congress and thus prevent it from issuing any license at all.[24]

Under the interpretation of the majority below, however, such an incongruous result is possible since the greater power of the Commission is held hostage to the lesser power of Interior.[25] To be sure, condi-

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upon by the court below, the majority indicated that the interference/inconsistency finding "can obviously only be made by ascertaining the rights confirmed upon the Band by the treaties establishing the reservation" (*id.* at 211). As the dissent in that case pointed out, however, the upshot of the majority's position is that, despite the comprehensive thrust of Part I of the Federal Power Act as applicable to Indian reservations, "no reservation lands could ever be used in power projects" (*id.* at 212).

[24] Our construction of the Section 4(e) proviso is further buttressed (see, *e.g.*, *Kokoszka* v. *Belford*, *supra*), by reference to the parallel proviso of Section 4(e) dealing with projects on navigable waters. That proviso requires a finding by the Commission that a license for facilities on navigable waters is desirable "in the public interest" for developing a waterway for the "use or benefit of * * * commerce" and additionally provides for approval by the Secretary of the War (now, Secretary of Army), under whose supervision navigable waters fall, of the "plans"" for dams and structures affecting navigation.

[25] See Section 10(a) of the Act, 16 U.S.C. 803(a) (emphasis added), which provides that the project as adopted "shall be such as *in the judgment of the Commission* will be best

tions advanced by Interior are entitled to and are given great weight by the Commission, but to allow Interior full sway to veto the issuance of a license is to "attribute to Congress the intention * * * to open the door to * * * obvious incongruities and undesirable possibilities" (*Metropolitan Edison Co.* v. *People Against Nuclear Energy*, No. 81-2399 (Apr. 19, 1983), slip op. 7), and in the last analysis, to " 'paralyze with one hand what it sought to promote with the other.' " *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, No. 82-34 (May 16, 1983), slip op. 18 (quoting *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 489 (1947)). Indeed, as this Court has made clear, a statutory exception or proviso should not be construed in such a manner as to undermine the very authority (here, the Commission's authority to issue a license) it was intended to qualify. *Adams Express Co.* v. *Croninger*, 226 U.S. 491, 507 (1913); *Greely* v. *Thompson*, 51 U.S. (10 How.) 225, 237 (1850); *W.D. Lawson & Co.* v. *Penn Central*, 456 F.2d 419, 423 (6th Cir. 1972); see also *Flynt* v. *Ohio*, 451 U.S. 619, 622 (1981). But that is the very effect of the decision below.

b. In these circumstances, the majority's reliance upon the plain language rule does not advance its position. It is true that Section 4(e) provides that the license "shall" include the conditions which the Secretary deems necessary (see Pet. App. 23-24), but that

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adapted to a comprehensive plan for improving or developing a waterway * * *; for the improvement and utilization of waterpower development, and for other beneficial public uses * * *; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works * * *"; see also, *FPC* v. *Idaho Power Co.*, 344 U.S. at 23.

does not end the inquiry. See *e.g.*, *Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. at 403 (assertion based on literal language of Section 4(e) is refuted "when § 4(e) is read together with the rest of the Act, as of course, it must be"). Although "shall" is usually mandatory, it does not necessarily eliminate all discretion. *Califano* v. *Yamasaki*, 442 U.S. 682, 693-694 n.9 (1979); *Richbourg Motor Co.* v. *United States*, 281 U.S. 528 (1930); *Railroad Co.* v. *Hecht*, 95 U.S. 168 (1877).[26] Moreover, as this Court has made clear, the plain meaning rule is " 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.' " *Watt* v. *Alaska*, 451 U.S. 259, 266 (1981) (quoting *Boston Sand & Gravel Co.* v. *United States*, 278 U.S. 41, 48 (1928) (Holmes, J.)); see also *NLRB* v. *Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (Hand, J.). As we next show, "persuasive evidence" appears in the legislative history of the FPA.

2. Legislative History

There are at least three themes in the legislative history which strongly support our position here. First, that history makes clear that the fundamental purpose of the Act was to centralize authority in the Commission, "instead of the piecemeal, restrictive, negative approach of the Rivers and Harbors Acts and other federal laws previously enacted" (*First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. at

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[26] Conversely, while the word "may" when used in a statute normally "implies some degree of discretion * * * [s]uch meaning can be defeated by indication of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute * * *." *United States* v. *Rodgers*, No. 81-1476 (May 8, 1983), slip op. 27.

180); second, the history underscores that tribal consent was not intended to be a prerequisite to the interference/inconsistency finding by the Commission; and, third, the legislative background points up that Congress was concerned with the exercise of the Commission's licensing authority in terms of the use and occupancy of Reservation land, thus invoking traditional concepts of limited conditioning authority relating to rights-of-way and easements.

a. The period of overlapping authority that existed prior to the passage of the Federal Water Power Act was marked by inefficiency, confusion, and very little hydroelectric development. See, *e.g.*, J. Kerwin, *Federal Water—Power Legislation* 105-114 (1st AMS ed. 1968); Pinchot, *The Long Struggle for Effective Water Power Legislation*, 14 Geo. Wash. L. Rev. 9 (1945).

In 1918, a bill prepared by the Secretaries of War, Interior, and Agriculture at the direction of President Wilson was introduced in Congress, H.R. 8716, 65th Cong., 2d Sess. (1918). It was designed as a composite of the bills that had been introduced previously (J. Kerwin, *supra*, at 217-218),[27] and contained the language of the Section 4(e) proviso basically as it is now framed. The principal architect of this bill, O.C. Merrill, Chief of the Bureau of

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[27] Between 1914 and 1917, four major bills antedating the 1918 bill had been introduced in Congress. Two chiefly concerned navigable waters and would have given the Secretary of War authority to issue licenses for projects (the Adamson Bill and the Shields Bill) and two chiefly concerned federal lands and would have vested the Secretary of the Interior with authority to issue licenses (the Ferris Bill and the Myers Bill). See *Chemehuevi Tribe of Indians* v. *FPC*, 489 F.2d 1207, 1220 n.61 (D.C. Cir. 1973), rev'd, 420 U.S. 395 (1975). For a further discussion of these bills see J. Kerwin, *supra*, at 172-216.

Engineers in the Department of Agriculture, explained that the purpose of the bill was to create a Commission consisting of the Secretaries of War, Interior, and Agriculture, "in order that whatever is done by existing agencies may be done under a consistent plan with a definite end in view, that there may be no duplication of work, overlapping of functions, or conflict of authority." *Hearings Before the House Comm. on Water Power*, 65th Cong., 2d Sess. (1918); accord H.R. Rep. 61, 66th Cong., 1st Sess. 5 (1919).[28]

This aim was echoed in the House debates on the bill. As Congressman Ferris stated in regard to a proposal to add the word "respectively" to Section 2 of the bill, which provided that the " 'work of the commission shall, in so far as practicable, be performed by and through the Departments of War, Interior, and Agriculture' " (56 Cong. Rec. 9667, 9668 (1918) (citation omitted)):

> Let me reply to that for just a moment. Of course, I think the purpose of the bill is to have this subject covered under one comprehensive water-power policy, so that the applicant for a license or a modification of it will know where to go to, and will know where to go for the final

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[28] As that House Report noted:

> The bill * * * provides that the administration of water powers within Federal jurisdiction, which has hitherto been handled independently by three separate departments, shall be coordinated, through a commission composed of the heads of these departments, in order that duplication of work may be avoided, that a common policy may be pursued, and that the combined efforts of the three agencies may be directed toward a constructive national program of intelligent, economical utilization of our power resources.

> word, and who is authorized to speak the final word. I think that in having a stool of three legs, if you must have the approval of each leg separately and respectively, you will never get anywhere. Personally I should like to see the action of that commission a single action, so that when action is taken, that will be the end of it. Our departments here are scattered all over town, and I do not know how other Members of the House have been impressed, but it certainly has been impressed on me when I go to transact a little business about the war or about the Navy or about any trivial thing that I start out in the morning and I wind up at night with some additional man yet to see. If this is intended to be a comprehensive measure—and I think it is, I think it is well conceived and well intended—we ought to make only one bite of a cherry.

And, in the ensuing debates, Congressman Raker, sponsor of the administration bill, similarly made clear that the proposed legislation sought to organize the Commission so that none of the three Secretaries could block the action of the other two (56 Cong. Rec. 9668-9669 (1918) (emphasis added)).[29]

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[29] The colloquy was as follows:

> Mr. RAKER. There is no doubt on earth that if anyone reads this bill, if he has any other mind upon it, he has entirely misconceived the purpose of it. We have appointed a commission, and the mere fact that these three men are respectively the Cabinet officers and the Secrearies of the three departments does not affect their powers as commissioners under this bill, and the provision was inserted that they may go to these various departments and get their assistants.
>
> Mr. WALSH. Well, I can not agree with the gentleman. Now, the gentleman says it does not affect their powers as Cabinet officers. I submit that under the au-

Indeed, once the bill passed Congress, the President withheld his signature because the Secretary of the Interior objected that the bill authorized the Commission to license projects on national parks and monuments (Reservations which fell under his supervision). Only after an agreement had been reached among the Secretary and members of Congress that Congress would pass legislation in its next session removing national parks and monuments from the scope of the Act, was the bill signed into law (H.R. Rep. 1299, 66th Cong., 2d Sess. 2 (1921)).

The legislative history of the 1930 amendment to the Act suggests further refinement of this purpose to centralize authority in one body. Thus, the aim of that amendment, the creation of a five member Commission appointed by the President, confirms that a Cabinet Secretary's authority to include conditions in a license was meant to qualify rather than control the Commission's licensing authority. That view was submitted by O. C. Merrill, who by that time was serving as the Secretary of the Commission.[30] In ad-

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thority given this commission in this bill the Secretary of Agriculture, as the executive head of that department, can not block a project upon which the other two commissioners have agreed.

Mr. RAKER. Why, it requires a vote of two of them.

Mr. WALSH. Surely; two.

Mr. RAKER. *And one can not defeat it.*

Mr. WALSH. The Department of War and the Department of the Interior can adopt a project even if the Secretary of Agriculture opposes it.

[30] Mr. Merrill stated (*Investigation of Federal Regulations of Power: Hearings Pursuant to S. Res. 80 and S. 3619 Before the Senate Comm. on Interstate Commerce*, 71st Cong., 2d Sess. 280-281 (1930) (emphasis added)):

In my opinion the best way to maintain the jurisdiction and interests of the three departments is to have the field

dition, James Lawson, then Acting Chief Counsel of the Commission, who had been with the Commission since its creation, was equally clear that the Commission, not any Cabinet Secretary, was meant to possess the ultimate authority to decide whether a license should issue, explaining (*Investigation of Federal Regulations of Power: Hearings Pursuant to S. Res. 80 and S. 3619 Before the Senate Comm. on Interstate Commerce*, 71st Cong., 2d Sess. 358 (1930)): "[t]he Commission now has power to overrule the head of the department as to the consistency of a license with the purpose of any reservation." Secretary of the Interior Wilbur, agreed, stating, inter alia,

> I cannot conceive of this Federal Power Commission really being effective unless it controls all power sites where it grants licenses, for if you have to ask the permission of this department or that department, there will be difficulties that will be absolutely impossible to overcome.

Federal Power Commission: Hearings on H.R. 11408 Before the House Comm. on Interstate and Foreign Commerce, 71st Cong., 2d Sess. 47-49 (1930).

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work in so far as it relates to the issuance of licenses, originally handled as it has been ever since I have been with the Federal Power Commission, through the departments, leaving the final decision to the Federal Power Commission. But the three departments have no final say in those matters.

* * * * *

The Agricultural Department in such cases is cooperating with this new commission, and its officers are making reports upon certain projects, with recommendations to the Federal Power Commission. But there is where the responsibility ends. ***The decision rests with the Federal Power Commission.***

In sum, this legislative history is at odds with any suggestion that Section 4(e) was meant to vest each of the three Cabinet Secretaries with absolute authority to foreclose the issuance of a license on Reservation lands under his supervision.

b. The legislative history also puts to rest the argument, adopted by the court below, that Congress intended the interference/inconsistency clause of the Section 4(e) proviso to subject the Commission's authority to issue a license for a hydroelectric facility on an Indian Reservation to tribal veto. During final Senate debate on the Administration bill Senator Nugent of Idaho proposed an amendment to Section 4(e) (then Section 4(d) of the bill) which would have required such consent (59 Cong. Rec. 1534 (1920)). Although doubt was expressed about the wisdom of granting an Indian tribe an "absolute veto" over a project for hydroelectric development (*id.* at 1567), the Senate adopted the proposed amendment (*id.* at 1570). House and Senate conferees, however, thereafter struck the amendment, observing that they saw "no reason why water-power should be singled out from all other uses of Indian reservation land for special action of the counsel of the tribe" (H.R. Rep. 910, 66th Cong., 2d Sess. 8 (1920)); and the bill passed without the amendment.

As Judge Anderson observed in his dissent below, this definitive expression of congressional intent is fundamentally irreconcilable with the opinion of the Ninth Circuit in this case that tribal consent is essential before a project may lawfully be licensed (Pet. App. 37). Moreover, subsequent legislation shows that Congress has never deviated from its basic position on this point.[31]

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[31] Rights-of-way and easements across Indian lands are now generally governed by the Act of Feb. 5, 1948, ch. 45, 62

c. It is also manifest from the legislative history that Congress intended the FPA to focus on practical land use issues in determining whether to use federal lands for the construction and operation of hydroelectric facilities.

Prior to the 1920 Act, the Secretaries of Interior, War, and Agriculture had authority to issue licenses for hydroelectric projects on lands under their supervision pursuant to a series of statutes authorizing them to grant rights-of-way across federal lands. See J. Kerwin, *supra*, at 105-114; 4 *Waters and Water Rights* § 330 (R. Clark ed. 1970), 2 C. Kinney, *Irrigation and Water Rights* §§ 927-971 (2d ed. 1912). These early Acts, on which the FPA was based, ordinarily contained provisos, similar to the proviso in Section 4(e) of the FPA, designed to protect public lands or reservations from physical disruption by the granting of any right-of-way on them.[32]

Stat. 17, codified at 25 U.S.C. 323 *et seq.* That Act authorizes the Secretary of the Interior to grant rights-of-way for all purposes across Indian lands held in trust by the United States "subject to such conditions as he may prescribe" (25 U.S.C. 323), and additionally requires the consent of the tribal officials or individual Indians of the Reservation. 25 U.S.C. 324. See generally *Southern Pacific Transportation Co.* v. *Watt*, 700 F.2d 550, 552-554 (9th Cir. 1983), cert. denied, No. 83-180 (Nov. 7, 1983). That Act, however, specifically exempts the provisions of the Federal Water Power Act, as amended, from its operation. 25 U.S.C. 326.

[32] A parallel series of statutes dealing with construction of dams and other structures in navigable waters evolved simultaneously. See The Rivers and Harbors Acts of 1880 (21 Stat. 197), 1884 (23 Stat. 133), 1888 (25 Stat. 425-426), 1890 (26 Stat. 425, 454), 1892 (27 Stat. 110), 1896 (29 Stat. 120) and 1899 (30 Stat. 1151). In 1906, Congress promulgated the General Dam Act, ch. 3508, 34 Stat. 386 *et seq.*, requiring

The two most important of those statutes for purposes of licensing hydroelectric facilities were the Right of Way Act of Mar. 3, 1891, ch. 561, 26 Stat. 1101, 43 U.S.C. 946 *et seq.* and the Act of Feb. 15, 1901, ch. 372, 31 Stat. 790, 43 U.S.C. 959.[33] The provisos in the sections of these Acts authorizing the issuance of rights-of-way reflected the established legal principle that an easement or right-of-way should be operated in such a manner as to minimize interference with the owner's occupation and use of his estate and may be expressly conditioned for that purpose. See generally, Frison, *Acquisition of Access Rights and Rights of Way on Fee, Public Domain, and Indian Lands*, 10 Rocky Mtn. Min. L. Inst. 217 (1965).[34] The fact that these concepts were carried

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approval by the Secretary of War and Chief of Engineers for any construction in navigable waters. The Act authorized those two officials to impose conditions on such construction "necessary to protect the navigability" of the affected waterway. This Act was further amended in 1910 (36 Stat. 593), to authorize permits for up to 50 years following consideration by the Secretary of War and Chief of Engineers of the impact of the project on a "comprehensive plan" for development of the waterway "with a view to the protection of its navigable quality."

[33] The relevant portions of these Acts, as amended in 1896 and 1911, are set forth in App., *infra*, 1a-4a.

[34] Thus, the regulations promulgated by the Secretary of the Interior under the Act of Feb. 15, 1901, show that the Act was concerned with the physical protection of reservations (31 Interior Dec. 13, 15).

> Whenever a right of way is located upon a reservation, the applicant must file a certificate to the effect that the right of way is not so located as to interfere with the proper occupation of the reservation by the government, and, when located upon any of their national parks designated in the act, the applicant must show to the satisfac-

over into the FPA is crucial since it underscores that Congress was focusing on practical concerns regarding the general physical use of Reservations, not broad concepts of Indian sovereignty or title to water.

Thus, as Congressman Ferris explained, it would be necessary to be "practical" in applying the proviso for the protection of Reservations in the bill he was proposing[35] and that where a hydroelectric facility would only occupy "the corner" of a large Reservation the issuance of a license would clearly be proper. 51 Cong. Rec. 13701-13703 (1914). It was entirely consistent with this practical approach that the 1920 Act made plain beyond any doubt that the Commission's licensing authority related solely to land use and

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tion of the Department that the location and use of the right of way for the purposes contemplated will not interfere with the uses and purposes for which the park was originally dedicated and will not result in damage or injury to the natural conditions of property or scenery existing therein.

See also, the 1894 Interior circular explaining that under the 1891 Act "control of the flow and use of water is * * * a matter exclusively under State or Territorial control, the matter of administration within the jurisdiction of this Department being limited to the approval of maps carrying the right of way over public lands." 18 Interior Dec. 168, 169-170 (1894).

[35] The proviso in the Ferris Bill (the chief public lands bill which preceded the Wilson Administration Bill), provided that a license could be issued by the Secretary of the Interior on or through a federal Reservation only upon a "finding by the chief officer of the department under whose supervision such reservation falls, that the lease will not destroy, materially injure, or be inconsistent with the purpose which such forest, national monument, or reservation was created or acquired." H.R. Rep. 842, 63d Cong., 2d Sess. 2 (1914).

not to broad questions of Indian sovereignty or water rights.[36]

B. The Commission's Approach In This Case Is Faithful To The Legal Principles Which Evolved From The Legislative Background

1. The Interference/Inconsistency Finding Basically Refers To Uses Of Land, Not Title To Water Or Indian Sovereignty

Consonant with the purpose of the 1920 legislation, the Commission has consistently taken the position that the most important criterion for determining whether a project will interfere or be inconsistent with the purpose for which a Reservation was created or acquired is the amount of Reservation land the hydroelectric facility will occupy. *Southern California Edison Co.*, 11 Fed. Power Svcs. (MB) 5-416, 5-425-427 (1977); *Power Authority*, 21 F.P.C. 146 (1959), on remand from *sub nom. Tuscarora Indian Nation* v. *FPC*, 265 F.2d 338 (D.C. Cir. 1958), rev'd, 362 U.S. 99 (1960); Note, *Tribal Consent and the Lease*

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[36] As Senator Myers explained in the final debates on the Wilson Administration water-power bill (56 Cong. Rec. 10494 (1918)):

> I believe it is the intention of the bill, as it was bills that emanated in times past from the Public Lands Committee of the Senate, merely to control, regulate, and dispose of the use of the public lands through which the water flows. It is not intended to interfere with the ownership and control by the State of those waters.

See also the statement of Congressman Taylor noting that he had incorporated Section 8 of the Reclamation Act into Section 14 of the Ferris bill to foreclose the Commission from exercising jurisdiction over water rights (51 Cong. Rec. 14067 (1914)) and see Sections 9(b) and 27 of the FPA, 16 U.S.C. 802(b) and 821; *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. at 176 n.20.

of Indian Lands for Federal Power Projects, 59 Minn. L. Rev. 385, 416 n.165 (1974).[37] If, as here, the facility occupies only a small fraction of the Reservation lands and otherwise will not have a disruptive impact on the Indians' use of their Reservation the Commission considers that it is reasonable to find that the interference/inconsistency clause of the Section 4(e) proviso has been satisfied.[38] At the same time, this focus on land use and not Indian "sovereignty" or title to water underscores that Section 4(e) does not require tribal consent to the is-

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[37] Thus as one commentator has observed:

> Water conduits, transmission lines, power houses, and access roads * * * are examples of project works which usually do not require a material amount of land, which create relatively negligible interference with the use of property and thus which conceivably can be found consistent with the purpose for which an Indian reservation was established. * * *
>
> Indian rights under the first proviso of Section 4(e) thus may be said to turn in the first instance upon a *de minimis* rule. If the proposed project facility will not require a material amount of tribal land and will not cause a significant disruption in the present or prospective mode of living of the Indian owners and occupants of the reservation, then the license may issue.

Lazarus, *Indian Rights Under the Federal Power Act*, 20 Fed. B.J. 217, 220-221 (1960).

[38] As the Commission observed in this case, the project occupies 26.77 acres (0.3%) of the La Jolla Reservation; 27.87 (0.7%) of the Rincon Reservation; and 37.38 acres (2.6%) of the San Pasqual Reservation (Pet. App. 138 n.138). Once the Escondido Canal is rerouted and placed underground, as ordered by the Commission, the usage of San Pasqual Reservation lands will drop to 18.28 acres (1.3%). Moreover, both the La Jolla and Rincon Reservations are located in mountainous terrain with very limited uses (*ibid.*).

suance of a license by the Commission for a project on an Indian Reservation.

2. Interior's Exercise Of Its Section 4(e) Conditioning Power Must Be Reasonable

Also in accord with the legislative background, the Commission has consistently construed the conditioning clause of Section 4(e) as requiring it to adopt only those conditions proposed by a Cabinet Secretary for inclusion in a license issued for a project on a Reservation under his supervision which are reasonably related to protection of the Reservation from undue disruption by the physical aspects of the construction and operation of the project. In accordance with this view, Section 4(e) requires the Commission only to adopt conditions proposed by a Cabinet Secretary "necessary for the adequate protection and utilization of such reservation" that are "reasonable" and "in the public interest." *Pigeon River Lumber Co.*, 1 F.P.C. 206, 209 (1935); accord, *Southern California Edison Co.*, 8 F.P.C. 364, 386 (1949) ("conditions is appropriate"). Thus, as already noted, while the Commission "gives great weight to the judgment and recommendations of the Department * * *, the Commission nevertheless must act on the basis of the record as a whole and must exercise its judgment to insure that the project * * * meets the requirement of Section 10(a) of the Act [requiring that the license be best adapted for a comprehensive plan for the improvement and use of water-power development]." *Pacific Gas & Electric Co.*, 58 F.P.C. 523, 526 (1975).

This interpretation has its roots in the settled law which the 1920 Act perpetuated.[39] It is thus well es-

[39] Indeed, the conditioning authority of the Secretary under Section 4(e), which is limited to conditions "*necessary* for

tablished that the authority to impose conditions on a right-of-way allows the party exercising the conditioning authority to impose only "reasonable terms and conditions." *Grindstone Butte Project* v. *Kleppe*, 638 F.2d 100 (9th Cir.), cert. denied, 454 U.S. 965 (1981) (dealing with the authority of the Secretary of the Interior to condition rights-of-way under the Act of 1891); 12 E. McQuillan, *Municipal Corporations* § 34.36 (3d rev. ed. 1970) (if municipal consent is required for a public right-of-way a municipality may impose only "reasonable conditions" on its consent to bind the user of the right-of-way). Accordingly, the Commission acted well within its authority when it refused in this case to adopt the condition proposed by the Secretary of the Interior relating to the Bands' water rights—a result which would have required the Commission to act outside of its authority and invade the province of the district court presently exercising jurisdiction over that claim. See App., *infra*, 6a.[40]

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the *protection and use*" (emphasis added) of Reservations is actually more circumscribed than the conditioning authority in the right-of-way statutes which preceded it. Not long ago Congress considered an amendment to the Trans-Alaskan Pipeline Authorization Act, Pub. L. No. 93-153, 87 Stat. 576 *et seq.*, to prevent any abuse of the broad discretion provided by that legislation to the Secretary of the Interior based on its concern that the Secretary might attempt to implement policy not specifically authorized by Congress by "imposing by indirection any type of condition on federal rights-of-way not expressly authorized by statute." Thus, in its proposed amendment it employed language focusing on "*protection* and *use* of the public lands" (emphasis added); such language is similar to that found in the Section 4(e) proviso (*Utah Power & Light Co.* v. *Morton*, 504 F.2d 728, 735-736 n.6 (9th Cir. 1974)).

[40] The instant case is thus similar to *Chapman* v. *El Paso Natural Gas Co.*, 204 F.2d 46 (D.C. Cir. 1953). There the Sec-

Indeed, the Department of the Interior itself has recognized the limitation of its own conditioning power under the Act of Feb. 15, 1901, whenever water rights issues are involved. See *Howard C. Brown*, 73 Interior Dec. 172 (1966), where the Department observed in pertinent part (*id.* at 175-178):

> The Department has long held that questions involving the control and appropriation of the waters of a State cannot be adjudicated under an application for right-of-way privileges over the public land. *Surface Creek Ditch and Reservoir Co.*, 22 L.D. 709 (1896). Despite his assertions to the contrary, this is precisely what the appel-

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retary of the Interior sought to impose a condition under the Mineral Leasing Act of Feb. 25, 1920, ch. 85, 41 Stat. 437, 30 U.S.C. 185 *et seq.*, on a right-of-way for a natural gas pipeline that would have required the pipeline to operate as a common carrier. The District of Columbia Circuit rejected the proposed common-carrier conditions, concluding that the Act only allowed the Secretary to condition the "physical aspects" of the right-of-way and that the Act barred him from conditioning the "operation" of the pipeline, which the court held was a regulatory matter vested in the Federal Power Commission. *Chapman* v. *El Paso Natural Gas Co.*, 204 F.2d at 51.

Utah Power & Light Co. v. *Morton*, 504 F.2d 728 (1974) is not to the contrary. There the Ninth Circuit held that the Secretary of the Interior could impose a wheeling requirement on the grant of a right-of-way issued pursuant to the Act of Feb. 15, 1901, ch. 372, 31 Stat. 790, 43 U.S.C. 959, and Act of Mar. 4, 1911, ch. 238, 36 Stat. 1253, 43 U.S.C. 961, for nonprimary transmission lines. The Ninth Circuit observed that the legislative history of the 1901 Act suggested that the authority granted the Secretary under the Act to impose conditions was intended to protect public lands from "interference or abuse" (504 F.2d at 734), and affirmed the use of the condition on the ground that it was not "unreasonable in its context" (*id.* at 735) and did not violate any regulatory jurisdiction vested in the Federal Power Commission.

> lant is asking the department to do, for, aside from the question of the right to appropriate water, he has not suggested in what way the approval of Kaiser's right-of-way application might be contrary to the public interest.
>
> * * * * *
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> In effect, then, appellant is seeking to have the Department do indirectly—by denial of the right-of-way application—what appellant can do directly in the State courts. This points up rather sharply that the basic issue is one of water rights, which the Department refuses to adjudicate.

In sum, it is plain that Interior's conditions under Section 4(e) must relate to the express concerns—principally land use—flowing from the physical project; they must be reasonable in dealing with those interests; and they cannot decide issues as to title to water over which the Commission has no jurisdiction. The Commission properly applied these principles to this case.

C. The Requirements Of Section 4(e) Do Not Extend To The Three Mission Indian Reservations Whose Lands Are Not Utilized For This Hydroelectric Project

The further ruling of the court below, that the Section 4(e) proviso reaches an Indian Reservation even though the hydroelectric project does not physically traverse it, rests on the notion that the Reservation is affected within the meaning of Section 4(e) so long as the project affects its use of water. This conclusion is also wholly refuted by Section 4(e)'s text and its history.

Section 4(e) refers to the issuance of a license "*within* any reservation" only after a finding that the

license will not interfere with the "purpose for which *such* reservation was created or acquired" (emphasis added). Moreover, "reservation" is defined in Section 3(2) as "*tribal lands* within Indian reservations," and Section 10(e) provides for annual charges for the use of "*tribal lands* embraced within Indian reservations" (emphasis added). On its face, therefore, Section 4(e) requires that the conditions proposed by Interior for Reservations relate to the specific Reservation *within* which the license is to be issued, not other Reservations which may somehow be "affected" by the project as the Bands and Interior contend.

As we have already noted, the legislative history establishes unequivocally that the Commission, as it held in this case, lacks jurisdiction to decide title to water as part of its licensing authority.[41] Accordingly, on this issue too the weight of authority is

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[41] Indeed, the Commission has consistently so maintained. *Southern California Edison Co.*, 23 F.E.R.C. ¶ 61,240 (1983), appeal pending *sub. nom. Aqua Caliente Band of Cahuilla Indians* v. *FERC*, No. 83-7708 (9th Cir.); *Rumford Falls Power Co.*, 36 F.P.C. 605, 607 (1966); *Seneca Nation of Indians*, 6 F.P.C. 1025, 1026 (1947); *East Bay Municipal Utility District*, 1 F.P.C. 12 (1932). Instead, it considers its authority is limited to authorizing the "use" of water to generate electric power. *Southern California Edison Co.*, 8 F.P.C. 364, 384 (1949); *Niagara Falls Power Co.*, 6 F.P.C. 184 (1947).

This Court has recognized the correctness of this determination. *First Iowa Hydro-Electric Cooperative* v. *FPC*, 328 U.S. 152, 175-176 & n.20 (1946); *FPC* v. *Niagara Mohawk Power Corp.*, 247 U.S. 239, 246-247 (1954). See also *California* v. *United States*, 438 U.S. 645, 660-662 & n.16 (1978), where this Court made clear that statutory right-of-way provisions which were precursors to the FPA do not deal with title to water.

flatly inconsistent with the ruling of the court below that the limitations of the Section 4(e) proviso must be extended to neighboring Reservations because their reserved water rights may be affected by the issuance of a Commission license.[42]

Indeed, this Court has already rejected a similar claim. In *Tuscarora*, the court of appeals had held that the federal interest in protecting the Indians against improper alienation of their lands was a sufficient "interest in land" under Section 3(2) of the Act to bring the Tuscarora Reservations (which were held in fee) within the requirements of the Section 4(e) proviso, *Tuscarora Indian Nation* v. *FPC*, 265 F.2d 338, 341-343 (D.C. Cir. 1958), rev'd, 362 U.S. 99 (1960). This Court reversed, concluding that the term "reservations" in Section 3(2) of the FPA could not be construed to incorporate such comprehensive and abstract considerations as "[t]he national 'interest' in Indian welfare and protection" but that instead Congress has concerned itself only with structures, lands, and interests in lands owned by the United States, when it promulgated the Act. *FPC* v. *Tuscarora Indian Nation*, 362 U.S. at 114-115. It is likewise true here that Section 4(e) cannot be read to incorporate within the Commission's licensing jurisdiction questions of Indian title to reserved water when Congress explicitly excluded such questions from the purview of the Commission's jurisdiction.

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[42] Interior admits that many of the conditions it proposes are designed to protect the three Mission Indians Reservations that are not occupied by Project No. 176 (Interior's Brief on Appeal 36). Nevertheless, as the Commission observed (Pet. App. 148), the Bands and Interior have also acknowledged that the Commission lacks jurisdiction to resolve the water-rights controversy pending in district court.

D. Against This Background Considerations Of Deference And Traditional Rules Governing Judicial Review Of Agency Action Require Affirmance Of The Commission's Interpretation Of The Section 4(e) Conditioning Power

In light of the foregoing background, settled principles underlying judicial review of agency action fully justify reversal of the decision below.

1. It is the settled rule that deference should be given to an agency's longstanding interpretation of the statute which it enforces. *Blum* v. *Bacon*, 457 U.S. 132, 142 (1982); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972). Under this standard, the Commission's interpretation should be followed unless there are compeliing indications that it is wrong. *Miller* v. *Youakim*, 440 U.S. 125, 144 (1979). A court need not find that this "construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981). Instead, the "narrower inquiry [is] whether the Commission's construction was "sufficiently reasonable" to be accepted by a reviewing court" (*ibid.*). Deference is particularly due where, as here, the construction by the administrative agency gives effect to the congressional intent. *Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. at 409-410.

2. Another firm precept of administrative law is also applicable here. If, as all the parties appear to agree, the Secretary's conditions must be "reasonable," then it follows, as Judge Anderson stated in his dissent, that the Commission should determine in the first instance whether the Secretary's proposed conditions satisfy the "reasonableness" standard. Any other approach, in our view, would be wholly

inconsistent with traditional principles of judicial review of administrative action, under which Commission licensing orders are reviewable to determine whether they have a reasonable basis in law and are supported by substantial evidence. *Scenic Hudson Preservation Conference* v. *FPC*, 453 F.2d 463 (2d Cir. 1971), cert. denied, 407 U.S. 926 (1972); *Namekagon Hydro Co.* v. *FPC*, 216 F.2d 509 (7th Cir. 1954); *Wisconsin Public Service Corp.* v. *FPC*, 147 F.2d 743 (7th Cir.), cert. denied, 325 U.S. 880 (1945).

Review under Section 313(b) of the FPA, 16 U.S.C. 835*l*(b), is thus predicated upon the determination of all fact questions by the Commission in the first instance. When the Commission includes in a license conditions proposed by the Secretary of the Interior pursuant to Section 4(e), the conditions become an integral part of the Commission's license and are reviewable on appeal. Similarly, when the Commission rejects conditions as unreasonably related to the need for the adequate protection and utilization of a Reservation, its findings are also subject to appellate review. An appellate court in reviewing the Commission finding is thereby afforded the benefit of the Commission's technical knowledge and experience. See *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 501 (1955); *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608, 620 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966) ("the Commission has an affirmative duty to inquire into and consider" all facts relevant to the decisionmaking standards imposed by the statutory scheme). As Judge Anderson explained in his dissent, "this procedure would preserve the control of FERC over licensing and at the same time respect the Secretary's statutory duty to protect the reservations" (Pet. App. 41).

These fundamental considerations are reflected in this Court's decision in *FPC* v. *Idaho Power Co.*, *supra*. There the Commission included conditions suggested by the Secretary of the Interior in a license it issued; and Idaho Power Company sought review, alleging that the Commission lacked authority to attach the conditions (344 U.S. at 19). The court of appeals agreed and entered a judgment which modified the license by striking the illegal condition (*id.* at 20). This Court reversed, holding the power of the court of appeals "to affirm, modify, or set aside" a Commission order in "whole or in part" does not authorize the Court to exercise "an essentially administrative function" (*id.* at 20-21). Thus *Idaho Power* stands for the proposition that it is the Commission's judgment on which Congress has placed its reliance for control of licenses" and that a court of appeals "usurps" that authority when it modifies a license by striking a condition (*ibid.*). It follows that the Commission must have the opportunity to fashion appropriate licenses even when conditions proposed by the Secretary of the Interior are involved and that only after Commission action is judicial review available.

The decision of the Ninth Circuit in this case skews that balanced resolution by limiting the Commission to deciding whether to issue a license with the conditions as proposed by a Cabinet Secretary or to issue no license at all. As we have shown, that result deprives the Commission of a great part of its administrative responsibilities under Section 4(e) and courts of appeals of the very administrative findings which they must review. See *Colorado-Wyoming Gas Co.* v. *FPC*, 324 U.S. 626, 634 (1945). At the same time, it places the administrative function improperly in the court of appeals. *Idaho Power Co.*, 344 U.S. at 21.

As the Secretary of the Interior testified at the 1930 hearings to amend the FPA,[43] the proper procedure is for any of the three Cabinet Officers to participate in hearings before the Commission and appeal the orders of the Commission to the court of appeals. Indeed, it was that approach which the United States Court of Appeals for the District of Columbia Circuit approved in a similar context:

> The Court is not without jurisdiction, as seems to be suggested by the Company, relying on the provision of Section 10(e) that the annual charges must be approved by the Secretary of the Interior * * *.
>
> The Secretary is a public figure who could not insist on withholding approval unless the rental rate to be paid were unreasonable. Considering the applicable statutes together he may approve a rental offered by the Company, and he may negotiate for an approved consensual arrangement; but if there is no agreement and the matter goes to the Commission, the Secretary can refuse to approve the rate fixed by the Commission only by seeking court review of its determination. As is the situation with the Tribes, the

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[43] The Secretary stated (*Federal Power Commission: Hearings on H.R. 11408 Before the House Comm. on Interstate and Foreign Commerce*, 71st Cong., 2d Sess. 47-49 (1930)):

> I agree with Secretary [of Agriculture] Hyde that we can well allow these departments to be represented at hearings before the Commission to present phases of departmental interests, rather than to have the control remain in the departments. Otherwise, even though you set up the Commission, you will leave in the hands of the Bureau heads, the power to negate whatever the Commission may want to do, that is, to ask the consent of the department involved.

Secretary can participate as a party and avail of the provisions for judicial review.

Montana Power Co. v. *FPC*, 459 F.2d 863, 873-874 (D.C. Cir.), cert. denied, 408 U.S. 930 (1972). The same principle should govern here.

II. IN ANY EVENT, CONTRARY TO THE RULING BELOW, SECTION 8 OF MIRA DOES NOT BAR THE COMMISSION FROM ISSUING A LICENSE WITHOUT THE CONSENT OF THE BANDS

As we have shown, the legislative history and relevant case law establish that Section 4(e) is a comprehensive and self-contained provision which was not intended to subject the Commission's licensing authority to Indian tribal consent. At all events, the court's view of the impact of MIRA on the Commission's licensing power was plainly incorrect. The legislative history of MIRA shows that Section 8 relates to acquisition of rights-of-way over Mission Indian lands by *private* individuals, not actions like those involved here which involve the Commission's granting of licenses for the use of Reservation lands pursuant to sovereign powers delegated to it by Congress.

Just prior to passage of MIRA, several irrigation companies were seeking rights-of-way across Indian land. The Department of the Interior believed that irrigation ditches and flumes would benefit both the settlers and the Mission Indian Bands, whose Reservations were situated in desert country. H.R. Rep. 3281, 50th Cong., 1st Sess. 12-13 (1888). However, in light of two Attorney General opinions that only Congress could authorize alienation of Indian lands,[44]

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[44] *Dam at Lake Winnibigoshish*, 16 Atty. Gen. Op. 552 (1880); *Lemhi Indian Reservation*, 18 Atty. Gen. Op. 563

Interior recognized that it lacked authority to approve private contracts for rights-of-way, even if they were beneficial. *Id.* at 13. Accordingly, Interior prepared an amendment to the Mission Indian Relief Bill (which became Section 8), authorizing the Bands to contract for the sale of rights-of-way, subject to Interior's approval (*id.* at 13-14), see also 22 Cong. Rec. 311 (1890). It is immediately evident, therefore, that Section 8 was enacted *to authorize* the alienation of lands by the Indians to third parties under federal supervision; it was not in any way intended to limit the long-standing sovereign authority of Congress to acquire or grant rights-of-way under its plenary power over public lands and Reservations. See *FPC* v. *Tuscarora Indian Nation*, 362 U.S. at 115-124; *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220 (1957); *United States* v. *Wittek*, 337 U.S. 346, 358-360 (1949); *Grand River Dam Authority* v. *FPC*, 246 F.2d 453, 455 (10th Cir. 1957).

In short, even if the court below were correct in its view that the interference/inconsistency provision of Section 4(e) must be read in terms of the treaties establishing a Reservation, the license in this case is not thereby flawed inasmuch as Section 8 of MIRA has no impact on the Commission's licensing authority over Indian Reservation land.

(1887). These decisions reflect the principle contained in the Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137, prohibiting private acquisition of Indian lands. This restriction against alienation survives today as 25 U.S.C. 177 except to the extent other statutes constitute an exception to it.

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be reversed.

Respectfully submitted.

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I authorize the filing of this brief.

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APPENDIX A

STATUTES INVOLVED

1. The Act of Mar. 3, 1891, ch. 561, § 18, 26 Stat. 1101, codified at 43 U.S.C. 946, as amended, by the Acts of Mar. 4, 1917, ch. 189, §1, 39 Stat. 1197; and May 28, 1926, ch. 409, 44 Stat. 668, provides in pertinent part:

> The right of way through the public lands and reservations of the United States is hereby granted to any canal ditch company, irrigation or drainage district formed for the purpose of irrigation or drainage, and duly organized under the laws of any State or Territory, and * * * to the extent of the ground occupied by the water of any reservoir and of any canals and laterals and fifty feet on each side of the marginal limits thereof, and, upon presentation of satisfactory showing by the applicant, such additional right of way as the Secretary of the Interior may deem necessary for the proper operation and maintenance of said reservoirs, canals, and laterals; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation; * * *.

2. The Act of May 15, 1896, ch. 37, § 2, 29 Stat. 120, codified at 43 U.S.C. 957, provides in pertinent part:

The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and national forests of the United States by any citizen or association of citizens of the United States for the purposes of generating, manufacturing or distributing electric power.

3. The Act of Feb. 15, 1901, ch. 40, § 2, 31 Stat. 790, codified at 43 U.S.C. 959, provides in pertinent part:

> The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest, and other reservations of the United States, * * * for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarring, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines,

electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest * * *.

4. The Act of Mar. 4, 1911, ch. 238, 36 Stat. 1253, codified at 43 U.S.C. 961, provides in pertinent part:

The head of the department having jurisdiction over the lands be, and he is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands and reservations of the United States for electrical poles and lines for transmission and distribution of electrical power, and for poles and lines for communication transmitting, relay, and receiving structures and facilities, to the extent of two hundred feet on each side of the center line of such lines and poles and not to exceed four hundred feet by four hundred feet for radio, television, and other forms of communication transmitting relay, and receiving structures and facilities, to any citizen, association, or corporation of the United States, where it is intended by each to exercise the right-of-way

herein granted for any one or more of the purposes herein named: *Provided*, That such right-of-way shall be allowed within or through any Indian or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest * * *.

APPENDIX B

The conditions proposed by Interior and rejected by the Commission as unreasonable can be summarized as follows:

Condition 2

"That the Vista Irrigation District will not utilize its lands above Henshaw Dam in any manner that will adversely affect downstream water quality or quantity. Before the Vista Irrigation District initiates any uses of its lands above Henshaw Dam that may adversely affect downstream water quality or quantity, it must obtain the written consent and approval of the Federal Power Commission, the Commissioner of the Bureau of Indian Affairs, and the La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians. This condition shall not apply to the use of the lands above Henshaw Dam for grazing purposes or to the current recreation lease."

(The Commission rejected this condition (Pet. App. 147) on the grounds that the lands would be subject to the Commission's Rules and Regulations to the extent they were covered by the license, the condition was too vague, and to the extent the lands were not covered by the license, the Commission lacked jurisdiction.)

Condition 3

"That the Vista Irrigation District agrees to be subject to the terms and conditions of the license and to the jurisdiction and control of the Federal Power Commission."

(The Commission rejected this condition (Pet. App. 146) on the ground that Vista was already subject to the Commission's jurisdiction.)

Condition 4

"That the Escondido Mutual Water Company and the Vista Irrigation District agree that they shall not infringe upon or interfere in any manner with the right of the Indian reservations to utilize the following annual quantities of water:

	25-year Annual Average	Maximum Annual Diversion
(a) La Jolla	4,990 acre-feet	7,285 acre-feet
(b) Rincon	11,140 acre-feet	16,590 acre-feet
(c) San Pasqual	3,590 acre-feet	5,210 acre-feet
(d) Pauma/Yuima (including Mission Reserve lands)	795 acre-feet	1,190 acre-feet
(e) Pala (including Mission Reserve lands)	21,679 acre-feet	31,880 acre-feet

That the Escondido Mutual Water Company and Vista Irrigation District recognize in their operations on the San Luis Rey River watershed that the reserved and other rights of the Indian reservations to the foregoing quantities of water from the San Luis Rey River shall at all times be prior and paramount to any and all rights of the Escondido Mutual Water Company and the Vista Irrigation District to the water of the San Luis Rey River."

(The Commission rejected this condition (Pet. App. 148-149) on the ground that it would require the Commission to adjudicate the Bands' rights under the *Winters* doctrine—an issue over

which it ruled it lacked jurisdiction and which will be decided in pending United States District Court litigation.)

Condition 5

"That no water be pumped from the Warner groundwater basin shall be transported through Project No. 176 facilities without the prior written agreement of the La Jolla, Rincon, Pala, Pauma, and San Pasqual Bands of Mission Indians, which shall be subject to the approval of the Secretary of the Interior."

(The Commission rejected this condition (Pet. App. 149-150) on the ground that it was inconsistent with the license the Commission was issuing and the Commission's authority to license project works.)

Condition 6

"That the Escondido Mutual Water Company and the Vista Irrigation District acknowledge that the La Jolla, Rincon and San Pasqual Bands of Mission Indians have the right at all times to take from the Escondido Conduit water for agricultural, domestic, recreational or other purposes, or for the purpose of recharging the groundwater basin upon which the Rincon Reservation relies. That the Escondido Mutual Water Company and the Vista Irrigation District will provide water for such purposes at the times and in the amounts specified by the Commissioner of Indian Affairs on an annual, monthly or daily basis. That the Escondido Mutual Water Company and the Vista Irrigation District will release water either at the diversion dam or at the

Rincon penstock for the purpose of recharging the Pauma and/or Pala groundwater basins at the times and in the amounts specified by the Commissioner of Indian Affairs on an annual, monthly or daily basis. That the Escondido Mutual Water Company and the Vista Irrigation District will provide such water from any and all sources as constitute a part of the San Luis Rey River system, including storage in Lake Henshaw, in satisfaction of this condition, and that the Indian Bands shall not be limited to the so-called natural flow of the San Luis Rey River. The releases required by this condition include releases from Lake Henshaw to maintain optimum fish flows in the San Luis Rey River above the diversion dam and releases for the maintenance of water quality in the Pala and Pauma groundwater basins. The quantities supplied to the Indian Reservations shall not exceed the quantities specified in Condition 4 above except when, in the opinion of the Commissioner of Indian Affairs, larger quantities are required for recharge, water quality, or fishery purposes.

(The Commission agreed with the sense of Condition No. 6 but denied it insofar as it was inconsistent with Article 29 of the power license which the Commission issued requiring supply of water to an Indian service area the Commission created (Pet. App. 150-151).)

Condition 7

"That the Escondido Mutual Water Company and the Vista Irrigation District will make the releases required by Condition No. 6 until a court

of competent jurisdiction rules that the releases not be made."

(The Commission rejected condition No. 7 (Pet. App. 150-151) for the same reason it rejected Condition No. 6.)

Condition 8

"That the Escondido Mutual Water Company and the Vista Irrigation District agree to pay to the La Jolla, Rincon, and San Pasqual Bands of Mission Indians such reasonable annual charges as may be fixed by the Federal Power Commission based on the commercial value of the tribal lands involved for most profitable purposes for which suitable, including water and power development."

(The Commission rejected this condition (Pet. App. 151-152) as contrary to Section 10(e) of the FPA, which authorizes the Commission to fix "reasonable annual charges.")

Condition 9

"That the grant of any right-of-way for Project Nos. 176 and 559 across Indian land shall not preclude agricultural or other use by the Bands of any land included within the rights-of-way that are not actually utilized for the facility itself. Provided, however, that the Bands shall not erect permanent structures or make such other uses of the land which would interfere with or obstruct the licensee's access to project facilities; and further provided that the licensee or licensees agree to hold harmless the Bands, any members of the Band or other agents, employees,

lessees, or assigns for any damages, whatsoever, that may be caused by the maintenance or repair of project facilities on Indian lands by the licensee or licensees."

(The Commission rejected this condition (Pet. App. 153) as unnecessary since the rights-of-way run thru mountainous terrain and therefore have no apparent agricultural use.)

Condition 10

"That no new physical or operational use shall be made of the La Jolla, Rincon or San Pasqual Indian Reservations in connection with Project No. 176 operations that has not received the prior written approval of the Band, the Interior Department and the Federal Power Commission."

(The Commission rejected this condition (Pet. App. 153-154) as too vague and because it would preclude the Commission from acting alone when the Commission is entitled to act alone and the condition is not necessary for the protection and utilization of the reservations in view of the protections already afforded by the FPA.)

Condition 11

"That the license shall cover all of the Escondido Canal conduit above ground on the San Pasqual Reservation with precast concrete sections and still remove the unused portion of the concrete and flume structures no longer in use and shall restore the land."

(The Commission rejected this condition (Pet. App. 155-156) on the grounds that Mutual and

Escondido were fencing the canal and that it is not appropriate to destroy a usable facility since the San Pasqual Band could possibly use 12,000 feet of the conduit to be abandoned in order to carry water for their reservation. The Commission further stated that if the San Pasqual Band did not want to use the conduit to convey water, then the reservation should be restored by filling the canal and removing the flume structures.)

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